No. 17-1077

In the Supreme Court of the United States

FRANCIS V. LORENZO, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in an enforcement proceeding brought by the Securities and Exchange Commission, a person who knowingly disseminates false or misleading statements in connection with a securities transaction can be found to have violated Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. 77q(a)(1) (2006); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2006); and Rule 10b-5(a) and (c), 17 C.F.R. 240.10b-5(a) and (c), even if the person does not "make" false or misleading statements for purposes of Rule 10b-5(b), 17 C.F.R. 240.10b-5(b).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Aaron v. *SEC*, 446 U.S. 680 (1980) 9
Abbott v. *Veasey*, 137 S. Ct. 612 (2017) 20
Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 9, 11
Alstom SA Sec. Litig., In re, 406 F. Supp. 2d 433 (S.D.N.Y. 2005) 18
Cady, Roberts & Co., In re, 40 S.E.C. 907, 1961 WL 60638 (Nov. 8, 1961) 12
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 8, 10, 14
Chadbourne & Parke LLP v. *Troice*, 134 S. Ct. 1058 (2014) 11, 18
Dennis J. Malouf, In re, Securities Act Release No. 4463, 2016 WL 4035575 (July 27, 2016), petition for rev. filed, *Malouf* v. *SEC*, No. 16-9546 (10th Cir. Sept. 8, 2016) 11
Desai v. *Deutsche Bank Sec. Ltd.*, 573 F.3d 931 (9th Cir. 2009) 19
Dura Pharms., Inc. v. *Broudo*, 544 U.S. 336 (2005) 17
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 20
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983) 12

Cases—Continued: Page

Janus Capital Grp., Inc. v. *First Derivative Traders*, 564 U.S. 135 (2011) 6, 13, 14, 15
Lentell v. *Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir.), cert. denied, 546 U.S. 935 (2005) 18
Lorenzo, In re, Securities Act Release No. 3-15211, 2017 WL 6349871 (Dec. 12, 2017) 8
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 20
Morrison v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010) 8
Public Pension Fund Grp. v. *KV Pharm. Co.*, 679 F.3d 972 (8th Cir. 2012) 19
Santa Fe Indus., Inc. v. *Green*, 430 U.S. 462 (1977) 10
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) 10, 12
SEC v. *Clark*, 915 F.2d 439 (9th Cir. 1990) 9
SEC v. *Monterosso*, 756 F.3d 1326 (11th Cir. 2014) 14, 17, 19
SEC v. *Morgan Keegan & Co.*, 678 F.3d 1233 (11th Cir. 2012) 16, 20
SEC v. *National Sec., Inc.*, 393 U.S. 453 (1969) 12
SEC v. *Pentagon Capital Mgmt. PLC*, 725 F.3d 279 (2d Cir. 2013) 14
SEC v. *Zandford*, 535 U.S. 813 (2002) 10, 12
Stoneridge Inv. Partners, LLC v. *Scientific-Atl., Inc.*, 552 U.S. 148 (2008) 15
U.S. SEC v. *Big Apple Consulting USA, Inc.*, 783 F.3d 786 (11th Cir. 2015) 14, 17, 19
United States v. *Naftalin*, 441 U.S. 768 (1979) 11
United States v. *Williams*, 865 F.3d 1302 (10th Cir.), cert. denied, 138 S. Ct. 567 (2017) 9

Cases—Continued: Page

Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 20
WPP Luxembourg Gamma Three Sarl v. *Spot Runner, Inc.*, 655 F.3d 1039 (9th Cir. 2011) 19
Ward La France Truck Corp., In re, 13 S.E.C. 373, 1943 WL 29807 (May 20, 1943) 12

Statutes and regulations:

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 17
Securities Act of 1933, 15 U.S.C. 77a *et seq.*:
15 U.S.C. 77q(a)(1) (2006) (§ 17(a)(1)) ..... *passim*
15 U.S.C. 77q(a)(2) (2006) (§ 17(a)(2)) 10, 11, 12
15 U.S.C. 77q(a)(3) (2006) (§ 17(a)(3)) 17
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
15 U.S.C. 78j(b) (2006) (§ 10(b)) ..... *passim*
15 U.S.C. 78t(e) 15
15 U.S.C. 78u-4(b)(1) 17, 18, 19
17 C.F.R.:
Section 240.10b-5 (Rule 10b-5) ..... *passim*
Section 240.10b-5(a) (Rule 10b-5(a)) ..... *passim*
Section 240.10b-5(b) (Rule 10b-5(b)) ..... *passim*
Section 240.10b-5(c) (Rule 10b-5(c)) ..... *passim*

Miscellaneous:

Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793 (1967) 12

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-50) is reported at 872 F.3d 578. The opinion and order of the Securities and Exchange Commission (Pet. App. 51-95, 96-97) are reported at 111 SEC Docket 1761 and are available at 2015 WL 1927763. The initial decision of the administrative law judge (Pet. App. 98-121) is reported at 107 SEC Docket 5934 and is available at 2013 WL 6858820.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2017. On December 19, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 26, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an investment banker, sent two emails containing false statements to prospective investors. Pet. App. 3-5. The Securities and Exchange Commission (SEC or Commission) initiated administrative proceedings and determined that petitioner had violated Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. 77q(a)(1) (2006); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2006); and SEC Rule 10b-5, 17 C.F.R. 240.10b-5. Pet. App. 5-6.[1] The Commission imposed a cease-and-desist order, a civil penalty, and a lifetime bar from the securities industry. *Id.* at 6. On petition for review, the court of appeals held that petitioner had not violated Rule 10b-5(b) but that he had violated Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c). *Id.* at 14-34. The court vacated the civil penalty and industry bar and remanded to the Commission, where proceedings are ongoing. *Id.* at 35-37.

1. Petitioner worked as the director of investment banking at Charles Vista, LLC, a registered broker-dealer that petitioner described as "'a small boiler room'" where representatives "engaged in high-pressure sales tactics" and "seemed to be 'stretching the truth.'" Pet. App. 53-54. During the relevant period, petitioner's only client was Waste2Energy Holdings, Inc. (W2E), a start-up seeking to develop a "gasification" technology that could generate electricity from solid waste. *Id.* at 3. W2E's technology "never materialized," and the company "sought to escape financial ruin" by offering up to $15 million in convertible debentures—debt secured by the company's potential future earning power rather

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[1] All citations to the securities laws in the context of petitioner's case refer to the statutes in force at the time of his relevant conduct.

than by its existing assets. *Ibid.* Charles Vista served as the placement agent for W2E's debenture offering. *Id.* at 3-4.

Petitioner knew that W2E's technology "didn't really work" and that the company's financial condition "was horrible." Pet. App. 55. On October 1, 2009, W2E submitted SEC filings stating that its gasification technology and related assets that it had previously valued at more than $10 million had "no value," and that its total assets amounted to $660,408. *Id.* at 4 (citation omitted). Petitioner was aware of the filings and received an email explaining the write-off from W2E's chief financial officer. *Id.* at 4-5.

Petitioner nevertheless continued to seek investors for W2E's debenture offering. On October 14, 2009, petitioner sent two emails to prospective investors, with the subject "W2E Debenture Deal Points." Pet. App. 5, 59. The text of the emails, which petitioner contends was supplied by Charles Vista owner Gregg Lorenzo,[2] stated that the W2E debenture offering came with "3 layers of protection: (I) [W2E] has over $10 mm in confirmed assets; (II) [W2E] has purchase orders and" letters of intent "for over $43 mm in orders; (III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary)." *Id.* at 5, 16-18 (citation omitted; brackets in original). One email stated that petitioner had sent it "[a]t the request of Gregg Lorenzo." *Id.* at 5 (citation omitted; brackets in original). The other email stated that it had been sent "[a]t the request of" a Charles Vista broker and Gregg Lorenzo. *Ibid.* (citation omitted; brackets in original). Petitioner signed both messages with his name and title as "Vice President—

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[2] Gregg Lorenzo is not related to petitioner. See Pet. App. 3.

Investment Banking," and he told potential investors to contact him if they had any questions. *Ibid.*; see *id.* at 107-108 (reproducing full text of email). Petitioner later admitted that he "knew" that each of the critical statements in the two emails "was false and/or misleading when he sent them." *Id.* at 53.

2. a. The SEC instituted administrative proceedings against petitioner and charged him with violating three securities-fraud provisions. See Pet. App. 5.

First, the Commission charged petitioner with violating Section 17(a)(1). In relevant part, that provision makes it "unlawful for any person in the offer or sale of any securities * * * to employ any device, scheme, or artifice to defraud." 15 U.S.C. 77q(a)(1).

Second, the Commission charged petitioner with violating Section 10(b). In relevant part, Section 10(b) makes it "unlawful for any person * * * [t]o use or employ, in connection with the purchase or sale of any security * * * [,] any manipulative or deceptive device or contrivance in contravention of" the Commission's "rules and regulations." 15 U.S.C. 78j(b).

Third, the Commission charged petitioner with violating Rule 10b-5. In relevant part, that Rule makes it unlawful:

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a

> fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5.[3]

b. Petitioner contested the charges before an administrative law judge (ALJ). After a hearing, the ALJ found that petitioner "knew the truth about W2E's parlous financial condition" when he sent the two emails, which contained representations "staggering" in their "falsity." Pet. App. 108, 113. The ALJ concluded that petitioner had "willfully" violated each of the charged provisions "by his material misrepresentations and omissions concerning W2E in the emails." *Id.* at 114.

c. Petitioner sought review before the Commission, which conducted "an independent review of the record" and found that petitioner had violated each of the charged provisions. Pet. App. 53. Specifically, the SEC determined that petitioner had violated subsection (b) of Rule 10b-5 by making materially misleading statements in the two emails sent to prospective investors. *Id.* at 76; see *id.* at 73-76. The SEC separately determined that petitioner had violated Section 17(a)(1), Section 10(b), and subsections (a) and (c) of Rule 10b-5 by knowingly sending "materially misleading language from his own email account to prospective investors." *Id.* at 77. The Commission explained that petitioner's "role in producing and sending the emails constituted employing a deceptive 'device,' 'act,' or 'artifice to defraud' for purposes of liability under" those provisions, "[i]ndependently of whether" petitioner's "involvement in the

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[3] The SEC brought the same charges against Gregg Lorenzo and Charles Vista. Both those parties settled with the Commission. Pet. App. 5-6.

emails amounted to 'making' the misstatements for purposes of Rule 10b-5(b)." *Id.* at 77. As sanctions, the Commission imposed a cease-and-desist order, a $15,000 civil penalty, and a lifetime bar from the securities industry. *Id.* at 79.

3. Petitioner filed a petition for review in the court of appeals, challenging the Commission's liability determination and its imposition of an industry-wide bar and a $15,000 civil penalty. Pet. App. 7. The court granted the petition in part, vacated the challenged sanctions, and remanded for further proceedings. *Id.* at 36-37.

The court of appeals first held that substantial evidence supported the Commission's determination that the statements in the emails were false or misleading and that petitioner had acted with the requisite scienter. Pet. App. 7-14. Petitioner does not seek this Court's review of those aspects of the decision.

The court of appeals next held that petitioner had not violated Rule 10b-5(b) because he did not "make" the misleading statements in the emails. Pet. App. 15. Rather, the court concluded, the "maker" of those statements was petitioner's boss, Gregg Lorenzo. *Id.* at 16. The court relied on *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U.S. 135 (2011), in which this Court held that a person "make[s]" a statement under Rule 10b-5(b) only if he has "ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 142. The court of appeals concluded that Gregg Lorenzo had "ultimate authority" over the statements in the emails, and that he was therefore "the maker" of the statements for purposes of Rule 10b-5(b). Pet. App. 19 (citation omitted).

The court of appeals further held, however, that petitioner had violated Section 17(a)(1), Section 10(b), and

Rule 10b-5(a) and (c). Pet. App. 20-22. The court explained that those provisions, unlike Rule 10b-5(b), do not require that a violator "make" a false statement. *Id.* at 20. Rather, those provisions prohibit employing a fraudulent "device," "practice," or "scheme." *Id.* at 20-21 (citations omitted). The court found that petitioner's conduct in producing and sending emails containing false statements "fits comfortably within the ordinary understanding of" of the text of those prohibitions. *Id.* at 21. The court further observed that petitioner had presented "no argument that his actions fail to satisfy the statutory and regulatory language," and that he had not challenged the SEC's rejection of his "suggestion that he merely passed along the messages in his own name without thinking about their content." *Id.* at 22.

The court of appeals declined "to reach the merits" of petitioner's challenge to the sanctions. Pet. App. 35. Because the court had "no assurance that the Commission would have imposed the same level of penalties in the absence of its finding of liability for making false statements under Rule 10b-5(b)," the court vacated the sanctions that the SEC had previously imposed, and it remanded to the agency for further proceedings. *Ibid.*

Judge Kavanaugh dissented. As relevant here, he disagreed with the majority that petitioner had violated Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c). Pet. App. 46. In his view, liability under those provisions "must be based on conduct that goes beyond a defendant's role in preparing mere misstatements or omissions made by others." *Ibid.* He would have vacated the Commission's order with respect to both liability and sanctions. *Id.* at 37-38, 46.

4. The remand proceedings before the Commission are currently ongoing. *Inter alia*, the SEC has ordered

the parties to brief "what sanctions, if any, are appropriate." *In re Lorenzo*, Securities Act Release No. 3-15211, 2017 WL 6349871, at *1 (Dec. 12, 2017).

ARGUMENT

Petitioner challenges (Pet. 23-32) the court of appeals' determination that he violated Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c). The court correctly held that those provisions encompass petitioner's dissemination of false or misleading statements to prospective investors. Petitioner also contends (Pet. 13-23) that the courts of appeals are divided over whether conduct like his is actionable under the securities laws. But petitioner does not identify any conflict over the scope of liability under Section 17(a)(1). With respect to Section 10(b) and Rule 10b-5(a) and (c), the decisions that petitioner views as inconsistent with the decision below have involved different conduct by the defendants, and they arose out of suits brought by private plaintiffs, rather than (as in this case) an administrative enforcement action brought by the SEC. The current interlocutory posture of the case, and the pendency before the Commission of proceedings in which petitioner is actively challenging the sanctions that the agency previously imposed, provide a further reason to deny review.

1. The court of appeals correctly held that petitioner's misconduct violated Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c). Pet. App. 19-34.

a. The "statutory text controls the definition of conduct covered by" the federal securities laws. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175 (1994); see *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 261 n.5 (2010). As relevant here, Section 17(a)(1) makes it unlawful "to

employ any device, scheme, or artifice to defraud" in offering or selling a security. 15 U.S.C. 77q(a)(1). Rule 10b-5(a), incorporated through Section 10(b), prohibits "employ[ing] any device, scheme, or artifice to defraud * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(a). Rule 10b-5(c), also incorporated through Section 10(b), bars "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(c).

Petitioner's conduct "fits comfortably within the ordinary understanding of" those statutory and regulatory prohibitions. Pet. App. 20. "Words and phrases like 'fraud,' 'deceit,' and 'device, scheme or artifice' provide a broad linguistic frame within which a large number of practices may fit." *SEC* v. *Clark*, 915 F.2d 439, 448 (9th Cir. 1990); see *Aaron* v. *SEC*, 446 U.S. 680, 696 n.13 (1980) (citing dictionary definitions); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972) (stating that the "proscriptions" in Section 10(b) and Rule 10b-5 "are broad and, by repeated use of the word 'any,' are obviously meant to be inclusive"). Knowingly sending "email messages containing false statements" about a company's financial prospects "directly to potential investors," in order to induce recipients to participate in a debenture offering, is naturally described as employing a device, scheme, artifice, or act to defraud. Pet. App. 20; see, *e.g.*, *United States* v. *Williams*, 865 F.3d 1302, 1309 (10th Cir.) ("[S]cheme and artifice are defined to include . . . fraudulent pretenses or misrepresentations intended to deceive others to obtain something of value, such as money.") (citation omitted; brackets in original), cert. denied, 138 S. Ct. 567 (2017).

Indeed, petitioner "presents no argument that his actions fail to satisfy the statutory and regulatory language. He does not examine—or even reference—the text of those provisions in arguing that they should be deemed not to apply to his conduct." Pet. App. 22. The "text of the statute" accordingly "controls [the] decision" here. *Central Bank of Denver*, 511 U.S. at 173.

The history and purpose of the relevant provisions reinforce the conclusion that they encompass petitioner's conduct. Congress enacted the federal securities laws to "insure honest securities markets and thereby promote investor confidence," and to "achieve a high standard of business ethics in the securities industry." *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) (citations and internal quotation marks omitted); see *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 198 (1963). The antifraud provisions of the Securities Act and the Exchange Act therefore must be "construed not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Zandford*, 535 U.S. at 819 (citations and internal quotation marks omitted); see, *e.g.*, *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 475-476 (1977); *Capital Gains*, 375 U.S. at 186. Petitioner's dissemination of false statements to prospective investors, in hopes of attracting support for W2E's debenture offering, directly implicates Congress's market-protective purposes. Pet. App. 22.

2. a. Petitioner contends (Pet. 24-26) that fraud claims involving false statements can proceed only under Section 17(a)(2) and Rule 10b-5(b). As relevant here, those provisions make it unlawful "to obtain money or property by means of any untrue statement of a material fact," 15 U.S.C. 77q(a)(2), or "[t]o make any untrue statement of a material fact," 17 C.F.R. 240.10b-5(b), in

connection with a securities transaction. But nothing in the text, structure, history, or purpose of the relevant provisions suggests that the references to "statement[s]" in Section 17(a)(2) and Rule 10b-5(b) mean that a fraud claim based on false statements can proceed *only* under those two provisions.

The fact that a person can be liable for *making* a false statement under Rule 10b-5(b) does not preclude the imposition of liability for *disseminating* a false statement as part of a "device, scheme, or artifice to defraud" under Section 17(a)(1) or Rule 10b-5(a), or as part of an "act, practice, or course of business which operates * * * as a fraud" under Rule 10b-5(c). 17 C.F.R. 240.10b-5(a) and (c). To the contrary, "[e]ach succeeding prohibition" of Section 17(a) "is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *United States* v. *Naftalin*, 441 U.S. 768, 774 (1979). Similarly, while Rule 10b-5(b) "specifies the making of an untrue statement," the "first and third subparagraphs are not so restricted." *Affiliated Ute*, 406 U.S. at 153; see *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1063 (2014) (noting that Rule 10b-5 covers fraudulent conduct beyond "the making of" false statements). Indeed, "[i]t would be arbitrary to read th[e] terms" of Section 17(a)(1) and Rule 10b-5(a) and (c) "as *excluding* the making, drafting, or devising of a misstatement or omission." *In re Dennis J. Malouf*, Securities Act Release No. 4463, 2016 WL 4035575, at *8 (July 27, 2016), petition for rev. filed, *Malouf* v. *SEC*, No. 16-9546 (10th Cir. Sept. 8, 2016). The court of appeals correctly declined "to treat the various provisions as occupying mutually exclusive territory, such that false-statement cases must reside exclusively within the province of Rule 10b-5(b)." Pet. App. 26.

The history of the relevant provisions confirms that Congress and the Commission did not confine all false-statement claims to Section 17(a)(2) and Rule 10b-5(b). It is "hardly a novel proposition" that different provisions of the securities laws "'prohibit some of the same conduct.'" *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 383 (1983) (citation omitted). "The Securities Act of 1933 was the first experiment in federal regulation of the securities industry," and it was "understandable" that Section 17(a) "include[d] both a general proscription against fraudulent and deceptive practices and, out of an abundance of caution, a specific proscription against" nondisclosure under Section 17(a)(2), even though "a specific proscription against nondisclosure" was arguably "surplusage." *Capital Gains*, 375 U.S. at 197-199. Rule 10b-5 likewise reflects the SEC's intent to stamp out fraud in the purchase or sale of securities. See *Conference on Codification of the Federal Securities Laws*, 22 Bus. Law. 793, 922 (1967). The Commission accordingly based Rule 10b-5 on Section 17(a), and it has long interpreted the subsections of the two provisions as "mutually supporting rather than mutually exclusive." *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 1961 WL 60638, at *4 (Nov. 8, 1961).

Indeed, in its early years, the Commission did not explicitly distinguish between subsections in finding violations of Rule 10b-5. See, *e.g.*, *In re Ward La France Truck Corp.*, 13 S.E.C. 373, 1943 WL 29807 (May 20, 1943). The presence of "some overlap" among the anti-fraud provisions therefore "is neither unusual nor unfortunate." *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 468 (1969). Rather, it reflects that those provisions are to "be read flexibly, not technically or restrictively." *Zandford*, 535 U.S. at 821 (citation omitted).

b. Petitioner contends (Pet. 25-30) that the decision below is inconsistent with this Court's decision in *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U.S. 135 (2011). That argument lacks merit.

In *Janus*, this Court addressed whether a mutual-fund investment adviser could be held liable in a private action under Rule 10b-5(b) for "mak[ing]" materially false statements in its client mutual funds' prospectuses. 564 U.S. at 137 (quoting 17 C.F.R. 240.10b-5(b)) (brackets in original). The Court concluded that the adviser could not be held liable under that provision because it did not "make" the statements in the prospectuses, as subsection (b) requires. *Id.* at 146. "For purposes of Rule 10b-5," the Court explained, "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 142. Because only the mutual fund itself had authority over the statements in the prospectuses, only the fund could be liable under Rule 10b-5(b) for "mak[ing]" false statements. *Id.* at 146.

Applying *Janus*, the court below held that petitioner was not liable under Rule 10b-5(b) for "mak[ing]" false statements because only his boss, Gregg Lorenzo, had "ultimate authority" over the statements in the emails. Pet. App. 19 (quoting *Janus*, 564 U.S. at 142). But as the court of appeals explained, a non-maker of a statement can be liable under Section 17(a), Section 10(b), and subsections (a) and (c) of Rule 10b-5 if he carries out a device, scheme, artifice, or act to defraud. See *id.* at 20. That conclusion is compelled by the text, structure, history, and purpose of those provisions, and it is fully consistent with *Janus*, which did not address the scope of liability under any provision other than Rule 10b-5(b). The *Janus* Court did not suggest that an individual's

failure to "make" a misstatement for purposes of subsection (b) precludes liability under the other antifraud provisions for deceptive conduct that involves disseminating misstatements. See *U.S. SEC* v. *Big Apple Consulting USA, Inc.*, 783 F.3d 786, 797 (11th Cir. 2015) (stating that, because *Janus*'s reasoning is based on the text of Rule 10b-5(b), its holding "does not apply" beyond that subsection) (citation omitted); *SEC* v. *Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014) (per curiam) ("*Janus* only discussed what it means to 'make' a statement for purposes of Rule 10b-5(b), and did not concern * * * Rule 10b-5(a) or (c)."); *SEC* v. *Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287 (2d Cir. 2013) ("[S]ubsection (b) * * * was the only subsection at issue in *Janus*.").

Nor does the decision below "erase[ ] the distinction between primary and secondary liability" (Pet. 25) that this Court emphasized in *Janus* and *Central Bank of Denver*. In *Central Bank of Denver*, the Court explained that defendants in a private suit under Rule 10b-5 may be held liable only if they personally engage in the prohibited conduct. 511 U.S. at 177. Merely "giving aid to a person who commits" a prohibited act does not suffice. *Ibid.*; see *Janus*, 564 U.S. at 143 ("Rule 10b-5's private right of action does not include suits against aiders and abettors."). But petitioner was not found secondarily liable for aiding and abetting his boss's making of a false statement under Rule 10b-5(b). He was found primarily liable for his "active 'role in producing and sending'" misstatements with an intent to deceive, and for thereby "'employing a deceptive 'device,' 'act,' or 'artifice to defraud' for purposes of liability under Section 10(b), Rule 10b-5(a) and (c), and Section 17(a)(1).'" Pet. App. 21 (citation omitted).

Petitioner attempts to characterize his conduct as aiding and abetting by asserting (Pet. 30) that his "actions in sending emails to two investors were only ministerial," and that he (Pet. 31) simply "facilitat[ed] * * * the distribution of misstatements that were made by others." But petitioner did not simply assist in Gregg Lorenzo's transmittal of misinformation. Rather, petitioner "effectively vouched for the emails' content and put his reputation on the line by listing his personal phone number and inviting the recipients to 'call with any questions.'" Pet. App. 24; see *id.* at 34 (explaining that petitioner "sent the statements to potential investors carrying his stamp of approval as investment banking director"). Imposition of liability under these circumstances is fully consistent with *Janus*. Whereas the mutual-fund advisers in *Janus* likely would not be liable under the principles applied here because those advisers played no active role in disseminating the misstatements, petitioner both transmitted and effectively endorsed Gregg Lorenzo's misrepresentations. See *id.* at 24; accord *Stoneridge Inv. Partners, LLC* v. *Scientific-Atl., Inc.*, 552 U.S. 148, 155 (2008) (noting that defendants determined not to be primarily liable under Rule 10b-5(b) "had no role" in "disseminating" the misstatements in question).[4]

Petitioner also invokes (Pet. 9-12) the assertion of the dissenting judge below, premised on the factual findings of the ALJ, that petitioner lacked the scienter needed for liability under the relevant provisions because he drafted and sent the emails without thinking about their contents. See Pet. App. 39-40 (Kavanaugh, J., dissenting).

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[4] Unlike a private plaintiff, the SEC can bring an action based on aiding-and-abetting liability. See 15 U.S.C. 78t(e); *Janus*, 564 U.S. at 143. The SEC, however, did not pursue such a theory here.

As the court of appeals explained, however, petitioner *disavowed* that view of his own mental state in his brief to the court below, arguing instead that he lacked the requisite scienter because he believed the statements in the emails to be true. See *id.* at 22, 28. And the record amply supports the SEC's determination that petitioner knew the statements in the emails to be false. "One of [petitioner's] chief duties involved conducting due diligence on his clients, including reviewing their financial statements and public SEC filings." *Id.* at 9. Petitioner "knew that W2E's financial situation was 'horrible from the beginning' and that its gas-conversion technology had not worked as planned." *Ibid.* (citation omitted). But petitioner, "having taken stock of the emails' content and having formed the requisite intent to deceive, conveyed materially false information to prospective investors about a pending securities offering backed by the weight of his office as director of investment banking." *Id.* at 22. In any event, a fact-specific dispute about the adequacy of the mental-state evidence in this case would not present any question of general importance warranting this Court's review.

Petitioner suggests (Pet. 26) that the decision below will open the door to private suits against "large numbers of defendants who would otherwise be secondary actors and immune from suit by private plaintiffs because they did not make the misstatements at issue." That concern is misplaced. As explained above, defendants similarly situated to those in *Janus* and *Stoneridge* likely would not be liable under the decision in this case. Unlike the Commission, moreover, private plaintiffs must show reliance on the defendant's misconduct, see *SEC* v. *Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012) (per curiam) (collecting authorities), as well

as economic loss and loss causation, see *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005). And if a private plaintiff asserts a Rule 10b-5(a) or (c) claim involving misrepresentations or omissions, the defendant may argue that the heightened pleading standards set forth in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, apply to those allegations. See 15 U.S.C. 78u-4(b)(1). Petitioner's concern that the decision below will encourage meritless private suits is accordingly unwarranted.

3. Petitioner contends (Pet. 13-23) that this Court's review is warranted to resolve a conflict among the courts of appeals. That argument lacks merit. Petitioner identifies no sound reason to believe that any other circuit would have reached a different result under the circumstances presented here.

The absence of a circuit conflict is particularly clear with respect to the D.C. Circuit's application of Section 17(a). No court of appeals has rejected the proposition that liability under Section 17(a)(1) may be premised on a defendant's dissemination of false statements. Pet. App. 25-26. And no court of appeals has read *Janus* to require that a defendant must "make" a false statement in order to be held liable under Section 17(a). The only other circuit that has considered the question has concluded that *Janus* has no bearing on the proper interpretation of Section 17(a). See *Big Apple Consulting*, 783 F.3d at 798 (stating that Section 17(a)(1) and (a)(3) "are in no way directly or indirectly affected by the *Janus* decision"); *Monterosso*, 756 F.3d at 1334.

With respect to Section 10(b) and Rule 10b-5(a) and (c), none of the decisions that petitioner identifies as forming a "majority" position (Pet. 17-21) involved the kind of conduct at issue here—knowing dissemination of a

false statement directly to investors with intent to induce a financial transaction. And all the cases that petitioner cites were initiated by private plaintiffs rather than by the Commission. That distinction is significant because different statutory and other standards govern private securities-fraud actions. See, *e.g.*, *Troice*, 134 S. Ct. at 1063 ("The scope of the private right of action [under Rule 10b-5] is more limited than the scope of the statutes upon which it is based.").

Of particular relevance here, the PSLRA—which does not apply to actions brought by the Commission—requires that, "if an allegation regarding the *statement or omission* is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. 78u-4(b)(1) (emphasis added). Some courts have read the reference to a "statement or omission" in the PSLRA to indicate that the heightened pleading requirement applies only to Rule 10b-5(b), which expressly refers to statements or omissions. See, *e.g.*, *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005). Some courts have then interpreted Rule 10b-5(a) and (c) to exclude all claims involving false statements or omissions, on the theory that a contrary reading would enable private litigants to evade the PSLRA.

The Second Circuit, for example, has stated that, "where the sole basis for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b-5(a) and (c), *and remain subject to the heightened pleading requirements of the PSLRA.*" *Lentell* v. *Merrill Lynch & Co.*, 396 F.3d 161, 177 (emphasis added), cert. denied, 546 U.S. 935 (2005). The Eighth Circuit has similarly assumed that the PSLRA's heightened pleading requirements do

not apply to claims under Rule 10b-5(a) and (c), and it has concluded that "misrepresentation claims under Rule 10b-5(b) cannot simply be recast as scheme liability claims under Rules 10b-5(a) and (c)." *Public Pension Fund Grp.* v. *KV Pharm. Co.*, 679 F.3d 972, 986 (2012). The Ninth Circuit, citing *Lentell*, has concluded that "a Rule 10b-5(b) omissions claim" may not be "recast as Rule 10b-5(a) or (c) scheme liability claim." *WPP Luxembourg Gamma Three Sarl* v. *Spot Runner, Inc.*, 655 F.3d 1039, 1057 (2011).

The plain text of the PSLRA encompasses any "statement or omission" that is alleged to have played a role in a violation of the securities laws. The statutory text does not distinguish between statements or omissions that are fraudulent under Rule 10b-5(b) and statements or omissions that constitute (or are used to carry out) a deceptive device, act, or artifice to defraud under Rule 10b-5(a) or (c). 15 U.S.C. 78u-4(b)(1). There is accordingly no need to exclude false-statement claims from Rule 10b-5(a) and (c) in order to prevent evasion of the PSLRA.

The decisions cited by petitioner, moreover, rest on a concern that is wholly absent here, because the PSLRA does not apply to cases initiated by the Commission. There is accordingly no reason to believe that any other circuit would reach a result different from the court below in an SEC enforcement proceeding. See Pet. App. 33. Indeed, the only other court of appeals that has addressed the question presented in a case to which the Commission was a party has reached the same conclusion as the court below. See *Big Apple Consulting*, 783 F.3d at 795-796; *Monterosso*, 756 F.3d at 1334.[5]

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[5] Petitioner's reliance (Pet. 18) on *Desai* v. *Deutsche Bank Securities Ltd.*, 573 F.3d 931 (9th Cir. 2009) (per curiam), is particularly

4. Finally, the interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Abbott* v. *Veasey*, 137 S. Ct. 612 (2017) (Roberts, C.J., respecting the denial of the petition for a writ of certiorari); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). The court of appeals vacated the sanctions imposed by the SEC and remanded the matter to the Commission for further proceedings. Pet. App. 23. The Commission has not yet decided what sanctions, if any, are appropriate.

After the SEC resolves that issue, petitioner will have the opportunity to challenge the agency's remedial ruling in a court of appeals. Petitioner may then raise his current claims and any additional claims that are properly preserved in a single petition for a writ of certiorari seeking review of the final judgment against him. See, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

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misplaced. In *Desai*, the court of appeals addressed whether a putative class was entitled to the presumption of reliance under *Affiliated Ute*. But that issue was not addressed by the decision below—or in any other case where the Commission was the plaintiff—because the Commission need not show reliance to prevail under Rule 10b-5. See *Morgan Keegan*, 678 F.3d at 1244.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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